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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 L.M.,

12 Plaintiff,

CASE NO. C09-5249BHS

13 v.

14 STATE OF WASHINGTON,

15 Defendant.

ORDER GRANTING
DEFENDANT'S FRCP 12(b)(6)
MOTION TO DISMISS
PLAINTIFF'S 42 U.S.C. § 1983
CLAIM AND GRANTING
PLAINTIFF'S MOTION TO
AMEND COMPLAINT

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17 This matter comes before the Court on Defendant's motion to dismiss (Dkt. 7) and
18 Plaintiff's motion to amend (Dkt. 7). The Court has considered the pleadings filed in
19 support of and in opposition to the motions and the remainder of the file and hereby
20 grants the motions for the reasons stated herein.

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 On April 6, 2009, Plaintiff L.M. filed a complaint in the Superior Court of the
23 State of Washington in and for the County of Pierce. Dkt. 1 at 6-10 ("Complaint").
24 Plaintiff alleges that Defendant State of Washington is "liable for punitive damages,
25 attorney's fees and costs pursuant to 42 U.S.C. § 1983." *Id.* at 8, ¶ 5.2. On April 28,
26 2009, Defendant removed the action to this Court. Dkt. 1.
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1 Plaintiff's claims are based on allegations of inappropriate sexual contact while
2 she was admitted to Western State Hospital. On March 2, 2006, Plaintiff was admitted to
3 the hospital "for a mental health evaluation related to a criminal prosecution." Complaint,
4 ¶ 3.2. Plaintiff alleges that a psychiatric security agent, Warren Collie, "took advantage
5 of his employment position to have sexual contact with [Plaintiff]" *Id.*, ¶¶ 3.3-3.4.

6 On May 12, 2009, Defendant filed an FRCP 12(b)(6) Motion to Dismiss Plaintiff's
7 42 U.S.C. § 1983 claim. Dkt. 7. On May 28, 2009, Plaintiff responded. Dkt. 10.
8 Defendant did not file a reply.

9 On May 21, 2009, Plaintiff filed a Motion to Amend Complaint. Dkt. 8. On June
10 1, 2009, Defendant responded. Dkt. 11. On June 3, 2009, Plaintiff replied. Dkt. 13.

11 II. DISCUSSION

12 A. Motion to Dismiss

13 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a
14 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
15 theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).
16 Material allegations are taken as admitted and the complaint is construed in the plaintiff's
17 favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "Factual allegations must be
18 enough to raise a right to relief above the speculative level, on the assumption that all the
19 allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v.*
20 *Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege "enough facts to state a
21 claim to relief that is plausible on its face." *Id.* at 1974.

22 If a claim is based on a proper legal theory but fails to allege sufficient facts, the
23 plaintiff should be afforded the opportunity to amend the complaint before dismissal.
24 *Keniston*, 717 F.2d at 1300. If the claim is not based on a proper legal theory, the claim
25 should be dismissed. *Id.*

26 In this case, Defendant moves to dismiss Plaintiff's 42 U.S.C. § 1983 claim
27 because the only defendant named in Plaintiff's complaint is the State of Washington.
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Dkt. 7 at 1. Plaintiff concedes this issue and does not oppose Defendant's motion to dismiss this claim. Dkt. 10 at 1. Therefore, the Court grants Defendant's motion to dismiss Plaintiff's claim against the State of Washington.

B. Motion to Amend

In considering whether to permit an amendment, courts consider the following factors: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

In this case, Plaintiff moves to amend her complaint by adding parties and alleging additional facts in support of her § 1983 claim. Dkt. 8. Defendant objects to the amendments because (1) the relevant statute of limitations bars the claims and (2) Plaintiff should not be permitted to add "Doe" defendants. Dkt. 11 at 1-2. First, construing the complaint in the light most favorable to Plaintiff, Defendant has failed to show that Plaintiff's claims are barred by the statute of limitations. Therefore, the Court is not persuaded, at this time, that Plaintiff's claims are futile.

Second, Plaintiff seeks to add named defendants JANE and JOHN DOE, who allegedly were Mr. Collie's supervisors at the hospital. Dkt. 8 at 7, ¶ 3.10. To establish a supervisor's liability under § 1983, the plaintiff must demonstrate that the official "participated in or directed the violations, or knew of the violations and failed to act to prevent them." *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). In this case, taking the allegations in the light most favorable to Plaintiff, she alleges that Jane and John Doe "perpetrated the acts depriving plaintiff of her constitutional rights" Dkt. 8 at 7, ¶ 4.2. Therefore, Defendant has failed to show that Plaintiff's inclusion of these defendants is futile or that Defendant is unduly prejudiced by these amendments.

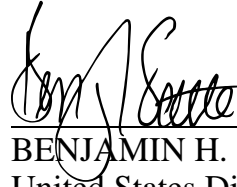
The Court grants Plaintiff's motion to amend her complaint.

III. ORDER

Therefore, it is hereby

1 **ORDERED** that Defendant's FRCP 12(b)(6) Motion to Dismiss Plaintiff's 42
2 U.S.C. § 1983 Claim (Dkt. 7) is **GRANTED** and Plaintiff's Motion to Amend Complaint
3 (Dkt. 8) is **GRANTED**. Plaintiff shall file the amended complaint no later than June 17,
4 2009.

5 DATED this 10th day of June, 2009.

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9 BENJAMIN H. SETTLE
10 United States District Judge
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